The Present Status of International Arbitration

WINNING ESSAY

BY

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IN THE FIFTH

PUGSLEY PRIZE CONTEST

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Anon

THE PUGSLEY PRIZE ESSAY CONTESTS

In 1908, Mr. Chester DeWitt Pugsley, then an undergraduate student in Harvard University, gave $50 as a prize to be offered by the Lake Mohonk Conference for the best essay on "International Arbitration" by an undergraduate student of an American college. The prize was won by L. B. Bobbitt, of Baltimore, a sophomore in Johns Hopkins University The following year (1909-10) a similar prize of $100 was won by George Knowles Gardner, of Worcester, Mass., a Harvard sophomore. A like prize of $100 in 1910-1911 was won by Harry Posner, of West Point, Miss., a senior in the Mississippi Agricultural and Mechanical College.

The prize of 1911-12 of which John K. Starkweather, of Denver, Colo., a junior in Brown University, was the winner, was the first offered to men students only (other similar prizes having been offered to women students) in the United States and Canada.

In the fifth Pugsley contest (1912-13) the prize was awarded to Bryant Smith, of Guilford College, N. C., a senior in Guilford College, at the same place, whose essay follows. The judges were Chancellor Elmer Ellsworth Brown of New York University, Rollo Ogden, Editor of the New York Evening Post, and Lieutenant General Nelson A. Miles, U. S. A., retired.

Each winner is invited to the Lake Mohonk Conference next following, where he publicly receives the prize from its donor, Mr. Pugsley.

The winning essays in the first, second and third contests are printed in the annual reports of the Lake Mohonk Conference for 1909, 1910 and 1911 respectively, while the winning essay of 1911-12 is printed separately in pamphlet form.

THE PRESENT STATUS OF INTERNATIONAL ARBITRATION

PRIZE-WINNING ESSAY IN THE PUGSLEY CONTEST, 1912-13

BY

BRYANT SMITH

Of Guilford College, N. C., a Senior in Guilford College.

The first concerted effort looking toward an eventual world-wide peace was the Hague Conference of 1899, where representatives of twenty-six nations assembled in response to a Rescript from the Czar of Russia, whose avowed purpose, as set forth in the Rescript, was to discuss ways and, if possible, devise means, to arrest the alarming increase in expenditures for armaments which threatened to bankrupt the national governments.

Unable to accomplish anything definite in this respect because of the vigorous opposition headed by Germany, the delegates turned their attention toward giving official recognition and concrete form to ideas which had already obtained in the settlement of international disputes, and toward the formation of a court before which the nations might have their differences adjudicated. The principles embodied in Good Offices and Mediation and Commissions of Inquiry have given gratifying evidence of their efficiency, each in its respective capacity. The original achievement of the Conference, however, was the Permanent Court of Arbitration. The composition of this court was to include not more than four persons from each of the signatory powers, from which panel, in case of an appeal to arbitration, each party was to select two judges, who, in turn, should elect their own umpire unless otherwise provided by the disputants. That it would be subject to criticism might have been expected. That twenty-six nations could unanimously agree upon any court whatever was the real occasion for surprise. The four cases arbitrated during the eight years intervening between this and the Second Hague Conference served to bring out its defects, chief of which were its decentralized and intangible nature. Nominally a court, in reality it was but a panel scattered all over the world from which a court could, with great difficulty and expense, be selected. Nominally permanent, in reality it had to be re-created for each case to be judged.

The Second Hague Conference, working on a basis of this

short experience, undertook to remedy these inherent defects in the arbitral machinery by leaving the Permanent Court just as it was, and by creating besides an International Court of Prize to serve a special function indicated by its name, a Court of Judicial Arbitration to supplement the work of, if not eventually to supplant, the former court. To insure greater impartiality and also to encourage the weaker powers, the expenses of the new court, instead of falling upon the litigants in each case, were to be prorated among the ratifying powers. To insure greater tangibility and permanency, the new court was to be composed of only seventeen members, each to serve a term of twelve years, at a salary of $2,400.00 per annum, with an additional $40.00 for each day of actual service. Furthermore, the court was to meet once a year and to elect each year a delegation of three of its members to sit at The Hague for settling minor cases arising in the interval between regular sessions. having the power also to call extra sessions of the entire court whenever occasion should demand. To insure a more judicial personnel, the Convention specifies that members shall be qualified to hold high legal posts in their respective countries. The method by which members of the court were to be appointed, the one point upon which the delegates were unable to agree, was deferred for subsequent determination.

This, in addition to the one hundred and fifty odd treaties privately entered into by two or more nations, many of which contain pledges to submit certain classes of disputes to the Permanent Court, is, in brief, what has been accomplished by way of constructive political organization by the modern peace movement.

How much does this signify? In view of the present attitude of the social mind, what are we to infer from this as bearing upon the ultimate outcome of international arbitration? It shall be the purpose of this paper to answer that question.

In an address before the Mohonk Conference of 1911, Dr. Cyrus Northrup, Ex-President of the University of Minnesota, said: "What is really wanted is not continued talking in favor of peace with the idea of converting the people; for the people are already converted! They are ready for peace and arbitration!" In the October number of the Review of Reviews for 1909, Privy Councillor Karl Von Stengel, one of the German delegation to the First Hague Conference, is quoted as follows: "It must be stated emphatically that in its ultimate aims the peace movement is not only . . . Utopian, but . . . dangerous . . . ." These quotations are given as typical of the attitude manifested by the two extremes, the injudiciously optomistic and the ultra-conservative, toward every social reform. All true progress pursues a course intermediate to these two.

The idea entertained by so many enthusiastic peace advocates,

that the world is ready for peace if we but had institutional facilities adequate to carry out the will of the people, is erroneous. In all democratic states political institutions are but a concrete expression of the social mind, the media created by the people, through which society executes its will. "With a given phase of human character . . . there must go an adapted class of institutions." [1] Therefore, I submit that if the people were ready for peace they could easily provide the means necessary for its accomplishment.

The first gentleman quoted above drew his conclusion from the indications that of the two million inhabitants of his state, one million nine hundred thousand would favor arbitration as shown by the enthusiasm manifested at a meeting of the State Peace Society a few weeks before. Similar conditions in other parts of the country, he thought, would corroborate the application of his assertion to the entire country. Such a conclusion is fallacious in that it fails to consider three essential facts about the people of the United States, which largely determine the attitude of any people toward war. First, they have no grievance. Second, no appeal is being made to their patriotic bias. Third, their emotions and passions are quiescent.

The first of these needs only brief mention. No people in this enlightened age wishes to fight as a matter of course, regardless of any reasonable pretext. If nations never had any personal interests involved, there would, of course, be no more war. In this respect the people of the United States are not ahead of the other parts of the civilized world. Disinterested parties have been in favor of peace for two thousand years.

The other two facts deserve more extended consideration.

The disposition in individuals to pluck motes out of their neighbors' eyes and leave beams in their own, in the nation becomes what Herbert Spencer calls the bias of patriotism. According to him patriotism is but an extended self-interest. We love our country because our own interests and our country's interests are one. Unable to view international affairs apart from national interests, we are handicapped in making those balanced judgments necessary to judicial arbitration. An act reprehensible under the Union Jack becomes patriotic under the Stars and Stripes. At both Hague Conferences all the powers were seemingly in favor of curtailing expenditures for armaments. The unprecedented increase in expenditures which followed bespeaks their sincerity, or, rather, bespeaks each nation's mistrust of the sincerity of others. A number of years ago the Farmers' Alliance, organized in some of the Southern tobacco states, voted to reduce the acreage of tobacco for a given year in order to raise the price. So many members tried to profit by this opportunity to realize a high price for a big crop

[1] Herbert Spencer, The Study of Sociology.

that there was a greater acreage planted that year than ever before. Can we expect better of groups than of the individuals of which the groups are composed? Most nations question the justice of Russia's policy leading up to the War with Japan, England's course in South Africa, and America's attitude toward the Philippines; yet the body of citizens of each of these three countries, while concurring in the general opinion concerning the other two, justifies its own government's actions with patriotic pride.

The chief respect in which this bias interferes with the progress of international arbitration is in restricting the scope of general arbitration treaties, the average formula of such treaty excluding all questions which involve "national honor and vital interests." A greatly modified survival of the spirit which in primitive peoples regarded the tribe over the mountain or across the stream as a fit object of hatred and fear, the objection to a judicial settlement of such questions assumes that a nation's honor and vital interests are goods peculiar in that they may be inconsistent with justice. The attitude of the United States toward the recently proposed treaty between England and America may be taken as typical of the attitude which prevails on this subject generally. The formulators of the treaty took an advanced step in that, instead of reserving questions of national honor and vital interests, they provided for the arbitration of all differences which are "justiciable in their nature by reason of being susceptible of decision by the application of principles of law or equity," thereby recognizing the judicial nature of arbitration. The action of the Senate, however, which sustained the opinion of the Majority Report of the Senate Committee on Foreign Relations, objecting to the last clause of Article III. of the treaty, would indicate that the significance of a general arbitration treaty attaches not so much to the definition of its scope as to who shall determine what cases conform to the definition. It would seem that the nature of the reservation is relatively unimportant so long as its interpretation devolves upon the parties at variance. The Majority Report, objecting to the delegation to the Joint High Commission of the power to determine the arbitrability of cases in terms of the treaty, contains this statement in which the Minority Report likewise concurs: "Everyone agrees that there are certain questions which no nation . . . will ever submit to the decision of anyone else." As cases of this nature it enumerates territorial integrity, admission of immigrants, and our Monroe Doctrine. The significance of this insistence upon a means of evasion is evident. There is not yet enough international confidence. The powers are not yet ready to submit to unlimited arbitration.

The other enemy to rational judgment,—and rational judgment must be the only basis of arbitration,—is the danger of

emotionalism. The average man is yet largely irrational. When cool and self-possessed, and when his prejudices and traditions do not interfere, he can pass rational judgment upon questions in which his own interests are not concerned; but when his passions are aroused he dispenses with any effort to reason and acts in obedience to blind impulse. He knows that it is expensive to fight, that it is dangerous and that it is wrong; but when he is provoked, he fights. The characteristics of the average man are the characteristics of society. We have not yet outgrown the mob.

Interwoven with this impulsive temperament and associated with some of the most cherished affections of the human heart, is the spirit of war, developed by thousands of generations of ancestral conflict and passed on to us as an heritage to be rooted out of our nature before we shall realize in its fulness the ideal for which we strive. Mortal conflict sanctified by religion, devastation idealized by literature, pillage justified by patriotism, fellow-destruction ennobled by self-sacrifice,—these form a complex of contradictory emotions from which men are as yet unable to unravel the one essential characteristic of war, namely; the attempt to dispense justice in a trial by battle, and make it stand out in its revealed inconsistency, dissociated from its traditional concomitants of which it is neither part nor parcel. The romance of knighthood and chivalry still appeals to the human heart, notwithstanding the fact that war, love and religion, the knight's creed, are an inconsistent combination. Most men can be made to see this in their minds, but cannot be made to feel it in their souls. Many old Civil War veterans, who would not consent for their sons to volunteer in the Spanish-American War, would have gone themselves had they been able. Some did go. To men so disposed it is useless to talk of the horrors of war. Give us a just grievance; let some competent enthusiast inflame this passion with a war cry like "Remember the Maine," "Fifty-four forty or fight," "Liberty or Death," and reinforced by the animal inherent in man, it will arouse popular demonstrations devoid of all reason, creating a force that cannot be controlled by a cold, calculating intellect. Can you listen to a bugle call on a clear still night without a quickening of the pulse as there flashes through your soul a suggestion of all past history with its marshalling hosts and heroic deeds? Can you see a military parade without a suggestion of Dixie and The Star Spangled Banner, or feeling your bosom swell with patriotic pride? This association may be, and doubtless is, a delusion, but it is a delusion developed and fortified by thousands of years of custom and precedent and it would be contrary to the history of human progress if man should become disillusionized in one generation. It may take centuries. If we are to have international arbitration in the near future, we must have it in spite of this spirit of war rather than by destroying

the spirit. In fact, the only practical way to destroy it is to let it, like vestigial organs of which biologists tell us, degenerate from disuse. This inherited emotional tendency remains as a threat with which we, as exponents of arbitration, must reckon before we are justified in saying that the world is ready for peace.

Because of these two social characteristics, the patriotic bias which perverts judgment, and uncontrolled passions which submerge reason, the educational propagandists still have a task to perform.

Let us now examine the stand-pat idea that unlimited arbitration is but a dream as expressed in the quotation from Privy Councillor Stengel. This is further from the truth than the other extreme just discussed. He who will, with an unprejudiced mind, examine cross-sections of history at widely separated stages, cannot fail to see that along with the growing tendency of reason to predominate over passion, superstition and custom, has been a parallel tendency to restrict militarism as a social activity. From war conceived as religion to war as patriotism, then war as commercialism and the tool of ambition, man is now coming to the more rational conception of war as the despoiler of nations. David speaks of the "season of the year" when nations went forth to battle. Fifteen hundred years later, governments pretended at least to justify their military operations on rational grounds. Today war is the last resort, and even its most ardent defenders do not attempt to justify it except in disputes which involve national honor and vital interests.

In view of the foregoing facts, it is evident that the modern peace movement has by no means the whole of the task to perform. Rather, we can almost justify ourselves in the assumption that war is not long to remain one of our social inconsistencies and that it is now making its last, and, therefore, most determined, stand on questions of national honor and vital interests.

Among the numerous forces contributing to this evolution of international peace, the chief agencies have been, and still are, moral and industrial. These same forces are working today with cumulative effect.

Warfare is becoming more and more inconsistent with the ethical spirit of the times. Men may talk of the expenses, horrors, and devastations of war as paramount causes for the tendency to substitute arbitration; but antedating all other causes, underlying and strengthening all others, is the slowly changing social conscience which, as each generation passes, appreciates more fully warfare's inconsistency with justice and antagonism to right. This same cause found civilized society taking keen delight in the heathen barbarity of a gladiatorial combat, and has transformed and lifted it up to where it is horrified at a

bull-baiting or a prize fight. It found human beings with absolute power of life and death over other human beings and has evolved the view that all men are created free and equal. It found individuals settling questions of honor by a resort to arms, and has substituted therefor a judge, council and a jury. These three institutions, gladiatorial combats, slavery and dueling, were no more regarded in their day as only temporary phenomena of social evolution than is war so regarded by military sympathizers of today, yet these have one by one been eliminated, and war is fast becoming as much out of harmony with the ethical spirit of this age as was each of the above out of harmony with the spirit of the age which dispensed with it, and the effort to demonstrate that war is just as dispensable is meeting with success. The teachings of Christ, who two thousand years ago announced the doctrine of human brotherhood and surrendered his life to make this doctrine effective, have slowly but surely wrought their leavening influence upon the source of all war, namely, the hearts of men. Warfare has for centuries been gradually yielding to this deepening consciousness and that it must eventually, if not soon, take its place beside the long discarded gladiatorial profession, the outlawed slave trade, and the discountenanced custom of the duelist, must be evident to anyone who takes more than a superficial view of the great determining forces which shape human progress.

Besides moral forces, industrial forces were mentioned as a factor tending to the adoption of arbitration. During recent times, under the impetus caused by the relatively modern innovations of steam, electricity and the press, this class of causes has been unusually effective. Industry has overstepped international boundary lines. Through the division of labor we are passing from the independence of nations to the interdependence of nations. International banking, transportation, and commerce, by establishing communities of interest in all parts of the world, are binding the peoples of the earth into one great industrial organization. As striking evidence of this development, more than one hundred and fifty international associations and more than thirty-five international unions of states have been formed. The modern intricate system of communication is a veritable nervous system which, in the event of any local paralysis or upheaval, informs the entire industrial organism. The figure is no longer the "shot, heard round the world," but becomes the "pulse-beat, felt round the world." If Spencer's definition of patriotism, that is co-extensive with personal interests, is correct, the bias of patriotism cannot retard the progress of arbitration much longer; for patriotism will be a world-wide feeling, since personal interests are no longer restricted to nationality.

No, Herr Stengel, each passing year finds the causes which make for war weakened and the causes which make for ar-

bitration proportionately reinforced. The skeptics are the dreamers and the peace workers are the practical men of affairs.

From the foregoing synopsis of the technical accomplishments of the modern peace movement to date, and from the effort to interpret their significance in the light of fundamental social characteristics and the present social attitude, I trust three things have become evident.

First. The movement for international peace through arbitration, far from being a mere bubble on the surface of society to be burst by the first war cloud which appears on the horizon, is a movement, centuries old, coincident with social evolution, deep-rooted in the very nature of a developing world-wide civilization.

Second. International peace through arbitration is not to be a ready-made affair, coming in on the crest of some wave of popular enthusiasm as was expected by many in 1899.

Third. Being an outgrowth of the natural laws of human development, a result so much deeper and more fundamental than political laws can produce, international peace through arbitration may be furthered, but cannot be accomplished, by legislation; may be delayed, but cannot be prevented, by the neglect to legislate. To undertake to hasten arbitration by forcing legislative proceedings beyond what the people will indorse, would be as futile as to turn up the hands of the clock to hasten the passage of time.

To those who can appreciate these facts there is no occasion for discouragement in the suspicious attitude manifested by the powers toward any definite step in the direction of unrestricted arbitration, apparently so inconsistent with their general pacific professions. "Rapid growth and quickly accomplished reforms are necessarily unsound, incomplete, and disappointing."[2]

With the truth of these deductions granted, it would seem safe to assume that the institutions for the settlement of international difficulties will develop in much the same way as have the institutions for the settlement of difficulties between individuals. It should be profitable, therefore, to compare the present growth of arbitration with the evolution and decay of the various modes of trial as the idea of judicial settlement diffused itself through the mind of the English people causing established forms to give way to something better. Dispensing with the Blood Feud, which hardly deserves the name of trial, the oldest form of such institution was Trial by Ordeal which, according to Thayer in his Evidence at the Common Law, seems to have been "indigenous with the human creature in the earliest stages of his development." This form gradually fell into disuse before the more rational form of Compurgation introduced into Teutonic Courts in the fifth century. In 1215 it was formally abolished. Compurgation was abolished in 1440 as its inferi-

[2] F. H. Giddings; The Elements of Sociology.

ority to Trial by Witnesses became fully recognized. In the latter form, instituted early in the ninth century, when the witnesses disagreed, the judicial talent of the day conceived of no other method of decision than to fight it out. Thus we have Trial by Witnesses and Trial by Battle developing concurrently, although they were recognized as distinct forms. After two centuries of effort to abolish it, Trial by Battle was made illegal in 1833, the last case recorded as being so decided occurring in 1835. Out of the Trial by Witnesses has evolved our modern Trial by Jury, at first limited to certain unimportant cases, then having its sphere extended as its superiority became more evident, until finally it superseded all other forms and today is the accepted mode of settling even questions of honor.

The growth and extension of international arbitration has not been dissimilar to this. Six cases were arbitrated in the eighteenth century, four hundred and seventy-one in the nineteenth, while more than one hundred and fifty cases have been arbitrated during the first thirteen years of the twentieth century. Between the First and Second Hague Conferences only four cases were submitted to the Permanent Court of Arbitration. Since the Second Conference, notwithstanding the unsatisfactory disposition of the Venezuelan affair, eight cases have been tried, a ninth is pending, a tenth will soon be docketed if the United States is not to act the hypocrite in her international relations by refusing to submit to England's request to arbitrate the question as to whether or no we exempt our coastwise vessels from toll duty through the Panama Canal. Defects have been detected in the Permanent Court of Arbitration and we are well on the way toward a better court. Representatives of only twenty-six nations took part in the deliberations of the First Hague Conference; representatives of forty-four nations took part in the deliberations of the Second Hague Conference. Wars of aggression and conquest, though not formally outlawed, are effectively so, and arbitration for the recovery of contract debts is now practically obligatory. As time passes and its feasibility gains credence, arbitration, like the jury trial, will extend its sphere of usefulness until it too settles questions of honor. Nor need we imply from this analogy that it will take such an age to accomplish this result. Because of the increased mobility of society, resulting from the greater like-mindedness and consciousness of kind incident to our modern communities of interests and systems of communication, and from our greater susceptibility to rational rather than traditional appeals, a reform can be wrought more easily and the people can adjust themselves to the change far more readily than several centuries ago.

Bearing in mind, then, our attempted analysis of counter social forces at work, our deductions from this analysis, and the foregoing analogy whose significance grows out of the truth of these deductions, let us conclude with a suggestion as to what the

next Hague Conference should attempt. It should, of course, like the former Conferences, extract as many teeth as possible from war. As to improving our arbitration facilities, its first task evidently should be to determine some method whereby members of the Judicial Arbitration Court shall be apportioned and selected. If, as has been suggested, it is decided to use the same scheme of apportionment as that for the International Court of Prize, the provision that each party to a case shall have a representative on the bench should be changed so as to provide that neither party shall have a representative on the bench. If this court is not to be a misnomer like the Permanent Court of Arbitration, its rulings must be in accord with the principles of jurisprudence rather than with the spirit of compromise such a provision would tend to produce. With this accomplished and the Judicial Court of Arbitration put in practical working order "of free and easy access" to the powers, it may be doubted whether anything further can be done. If the powers can be made to agree to submit to the court all cases growing out of the disputed interpretation of treaties, a great advance will have been made, but it is doubtful whether the present state of public opinion would indorse such a progressive step. These international legislators can do no more than provide channels through which the spirit of international peace can exercise itself as it expands, and the Judicial Court of Arbitration, at the optional use of the nations, conforms admirably to this requirement. The delegates should, therefore, avoid the universal tendency of such bodies to legislate too much. None of these Hague Conferences can alone accomplish the ultimate purpose of the so-called dreamers, but each Conference may be a landmark on the upward journey toward that consummation, anticipated by Utopians from the earliest times, foretold by prophets from Micah and Isaiah to Robert Burns and Tennyson, labored for by practical statesmen from Hugo Grotius to William H. Taft, when each man shall be a native of his state and a citizen of the world.

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